

Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System

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One of the most significant trends in the American legal system during the course of the last century has been the increasing role of the federal government. Of course, all governmental power has expanded, and the absolute power of state governments has increased as well. The federal government, however, has grown much faster; it has taken over many functions that were previously regulated by state law, so that its range of control, relative to that of the state governments, is far greater than it was one hundred years ago.

The growth of federal law at the expense of the states may be referred to as the "federalization" of our legal system. This term is actually a bit awkward, since it sounds a good deal like "federalism," which is largely an opposing tendency. But the most convenient alternative, "nationalization," is generally reserved for governmental ownership of previously private property.¹ Nationalization can be a rather powerful device for asserting central government control, but it is not the same thing as federalization, and it has not been a major component of that process in our country. Instead, the federal government has expanded its legal authority largely by initiating regulatory programs.

The checking, or demand deposit, system is only the most recent example of this process, but within its limited horizon, it is a rather striking one. The rules governing checks, which specify the obligations of the parties to the instrument, the method of transfer and collection, and the allocation of losses from fraud, forgery, and error, have always been a matter of state law,² and they have remained so despite the extensive federal regulation of the financial services industry in general.³ All this changed in 1987 when Congress passed the Expedited Funds Availability Act.⁴ The

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1. See, e.g., S. BREYER, REGULATION AND ITS REFORM 181-83 (1982); M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 168-69 (1986); 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 102 (R. Lillich ed. 1987). There are, however, numerous uses of the term "nationalization" to refer to the process of federal displacement of state law, rather than public ownership. See, e.g., Dubnick & Gitelson, *Nationalizing State Policies*, in THE NATIONALIZATION OF STATE GOVERNMENT 39 (J. Hanus ed. 1981); Lowi, *Europeanization of America?*, in NATIONALIZING GOVERNMENT: PUBLIC POLICIES IN AMERICA 15 (T. Lowi & A. Stone eds. 1978). No claim is made for the superiority of the term "federalization." In fact, there is no good term for the process, which is perhaps indicative of our failure to focus on it as a positive phenomenon. See *infra* text accompanying notes 7-8.

2. The current version is the Uniform Commercial Code, Articles 3 and 4.

3. Although partially "deregulated" by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 & 15 U.S.C.), and the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 & 15 U.S.C.), financial services remains one of the nation's most regulated fields. See generally H. KROOSS & M. BLYN, A HISTORY OF FINANCIAL INTERMEDIARIES (1971); R. LITAN, WHAT SHOULD BANKS DO? (1987); L. SPELLMAN, THE DEPOSITORY FIRM AND INDUSTRY: THEORY, HISTORY AND REGULATION (1982); Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565 (1966).

4. 12 U.S.C.A. §§ 4001-4010 (West Supp. 1988). See Ballen, *The Federalization of Articles 3 and 4*, 19 U.C.C. L.J. 34, 43-44 (1986). For a general discussion of the Act, see Cooter & Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987*, 35 UCLA L. REV. 1115 (1988).

Act was the product of consumer dissatisfaction with the bankers' practice of "holding" deposited checks for fairly lengthy periods before allowing customers to withdraw their funds. A number of its provisions are specifically directed to this problem, but the Act also gives the Federal Reserve Board (the Fed) plenary power over the check collection system and invites the Fed to use this power in a variety of ways.⁵ While the Act does not, of its own force, federalize the state law regarding checks in its entirety, it does displace a good deal of it and seems to spell the beginning of the end for the remainder. It thus provides a classic case of federalization and a perspective on the general aspects of this process.

Legal scholars have devoted a great deal of attention to federalization in recent years, but most of these discussions focus on "our federalism," the political or legal doctrine that protects state power from displacement by the national government.⁶ Federalism is one of those ideas that produces strong emotional reverberations in most Americans; like the family, small farms, and the frontier, it calls forth a feeling of affectionate nostalgia that strongly influences our analysis and sometimes affects public policy as well. A significant proportion of the scholarly discussions are devoted to bemoaning federalism's evident decline,⁷ which, like the coming extinction of the whooping crane, has directed attention to the subject and generated efforts toward its preservation. Still other discussions attempt to articulate new reasons for reviving it, with republicanism and community being the leading candidates.⁸

There seem to be considerably fewer explanations in the legal literature for the continued development of national power. Historians and political scientists, who are accustomed to working in a more descriptive mode, have addressed this question in considerable depth.⁹ But the same process is worth considering in a specifically legal context, employing the descriptive mode of history and political science, rather than lapsing into lamentations as legal scholars tend to do. The movement from state to national law, after all, is a positive phenomenon, whatever one's view of its

5. 12 U.S.C.A. § 4008 (West Supp. 1988).

6. The phrase is from Justice Black's opinion for the Court in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), which refused to enjoin state court proceedings under the California Criminal Syndicalism Act. Despite the broad sweep of its phraseology, the opinion deals exclusively with the limits of judicial power.

7. See, e.g., B. BARBER, *STRONG DEMOCRACY* (1984); D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URB. LAW. 493 (1987); Cooper, *The Demise of Federalism*, 20 URB. LAW. 239 (1988); Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Freilich, Greenhagen & Lamkin, *The Demise of the Tenth Amendment: An Analysis of Supreme Court Decisions Affecting Constitutional Federalism*, 17 URB. LAW. 651 (1985); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619; Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985). But see Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769.

8. See, e.g., Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553 (1987); Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980s*, 21 B.C.L. REV. 763 (1980); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 504-08 (1987).

9. See, e.g., W. RIKER, *DEMOCRACY IN THE UNITED STATES* (2d ed. 1965); Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9 (1978); Scheiber, *American Federalism and the Diffusion of Power*, 9 U. TOL. L. REV. 619 (1978); Sundquist, *American Federalism: Evolution, Status, and Prospects*, 19 URB. LAW. 701 (1987). For a general analysis of the political science and historical literature, see Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980).

desirability. It is not a misfortune that has overcome us, or a plot cooked up by some cabal of conspirators, but a social choice, a means by which our society has addressed a large number of its major problems.

This Article examines the reasons why the federalization of the law that governs check collection has occurred. Part I describes the two major events in this process: the Federal Reserve Act and, more recently, the Expedited Funds Availability Act. Part II discusses why the need for uniformity does not explain the federalization of the law, even though it may seem like the most obvious explanation. Part III then argues that federalization is driven by the need for uniform regulation, not uniformity per se. It does so by exploring regulation's separate components—operational rules, supervisory enforcement, and programmatic initiatives. Finally, Part IV discusses the normative aspects of law and identifies the norms that contribute to the federalization process. This Article does not contain an explicit prescription, but it does indicate that we cannot halt or reverse the federalization process unless we are willing to dispense with the regulatory and normative initiatives that drive it. Conversely, it also suggests that those who disapprove of these regulatory or normative initiatives may find federalism to be a convenient banner, one which possesses the allure of constitutionalism and community, while avoiding the stigma of reaction.

I. THE FEDERALIZATION OF CHECK COLLECTION

A. *Historical Background*

Originally, the check collection system was governed by common law.¹⁰ As such, it was subject to the Supreme Court's power to declare general common law, at least after *Swift v. Tyson*.¹¹ Nonetheless, state courts were the primary decision-makers, and there was no question that the state legislatures had the power to displace the common law, general or not, with their own statutory enactments. This in fact occurred around the turn of the present century. Responding to a perceived need for uniformity, and inspired by Britain's recent codification in this area,¹² the predecessor of the National Conference of Commissioners on Uniform State Laws promulgated the first uniform state act, entitled the Negotiable Instruments Law (NIL), in 1896.¹³ The Act had great success; it was adopted by most of the major commercial

10. On the common law background of negotiable instruments law, see generally Beutel, *Colonial Sources of the Negotiable Instruments Law of the United States*, 34 U. ILL. L. REV. 137 (1939); Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813 (1938).

11. 41 U.S. (16 Pet.) 1 (1842). See Freyer, *Negotiable Instruments and the Federal Courts in Antebellum American Business*, 50 BUS. HIST. REV. 435 (1976). For an argument that *Swift* represented a continuation of the pre-existing legal doctrine, see Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984). Professor Fletcher points out that there was a difference between federal common law, the law of the United States as a nation, and general common law—the law of all Anglo-American jurisdictions. This implies that *Swift* and similar decisions do not reflect a true process of federalization, but rather the use of the Supreme Court to achieve uniformity in the interpretation of the general common law that otherwise lay within the realm of state power to amend or displace. See *infra* notes 81–87 and accompanying text.

12. Bills of Exchange Act of 1882, 45 & 46 Vict., ch. 61.

13. For the history of the NIL, see F. BEUTEL, *BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENT LAW* 73–79 (7th ed. 1948). The sponsoring organization was called The Convention of Commissioners at that time. See *infra* note 89. For the text of the NIL, see F. BEUTEL, *supra*, at 110–208.

jurisdictions within about a decade after its promulgation and was ultimately enacted in every state.¹⁴ The NIL was the precursor of Articles 3 and 4 of the Uniform Commercial Code, and thus began a tradition of uniform state law governing the check collection system that has continued until the present day.

The process of federalizing check collection began in 1913 with the passage of the Federal Reserve Act.¹⁵ The main purpose of this Act was to regularize and control America's ever-truculent paper currency,¹⁶ but a subsidiary motivation was the perceived inefficiency of the check collection system. At the time the Act was passed, many banks charged fees, called exchange, for paying checks drawn on them, or for presenting checks directly to the payor bank on behalf of the depository bank.¹⁷ These fees were regarded as excessive in themselves, but their greater vice was that they induced collecting banks to send checks by circuitous paths, so that each bank would be dealing with its correspondent, and the check could finally be collected over the counter, thereby avoiding the fee.¹⁸ Contrary to the typical American pattern, the Act addressed this problem through a mechanism closely allied to true nationalization, rather than through regulation. It instructed the Fed to establish its own check clearing system, which would collect checks without imposing fees.¹⁹ Although this did not represent a government takeover of an existing private institution, the way true nationalization would, it did place a federally owned and operated system in direct competition with private clearinghouses and correspondent banks. By 1983 approximately one-third of the nation's annual volume of forty billion checks was being collected through the Federal Reserve System.²⁰

The Fed's regulation of the check collection process was largely limited to promulgating rules for its own system. Moreover, these rules, which were codified as Regulation J,²¹ largely tracked the provisions of state law. For the most part, therefore, the Fed's role was proprietary and not particularly innovative. It was far from unimportant, however, given the magnitude of the Fed's check collection operation. In addition, the Fed did act with initiative on a number of occasions. The first was its effort to eliminate the exchange fees that had motivated Congress to create the Fed's check collection system in the first place.

Although banks could collect checks through the Federal Reserve at par, that is,

14. F. BEUTEL, *supra* note 13, at 79; R. BRAUCHER & R. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS xxxviii-xxxix (1977). California adopted the NIL in 1917, Texas, the second to last state to do so, in 1919, and Georgia, the last state, in 1924.

15. Ch. 6, 38 Stat. 251 (1913) (codified in scattered sections of 12 & 31 U.S.C.).

16. See A. NUSSBAUM, A HISTORY OF THE DOLLAR 157-62 (1957).

17. See W. SPAHR, THE CLEARING AND COLLECTION OF CHECKS 101-04 (1926); Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 749 (1978).

18. See W. SPAHR, *supra* note 17, at 105-09. Spahr's account includes maps showing the peregrinations of various checks, including one that was deposited in a Birmingham, Alabama bank and was sent to the drawee in North Birmingham, some four miles distant, by way of Jacksonville, Florida and Philadelphia, Pennsylvania.

19. Federal Reserve Act, 12 U.S.C. §§ 248(o), 360 (1982). See W. SPAHR, *supra* note 17, at 164-65; Scott, *supra* note 17, at 747-53; Wyatt, *The Par Clearance Controversy*, 30 VA. L. REV. 361, 367-72 (1944).

20. *The Role of the Federal Reserve in Check Clearing and the Nation's Payments System: Joint Hearings Before the House Comm. on Government Operations and the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 1st Sess. 456-59 (1983) [hereinafter *1983 Joint Hearings*].

21. 12 C.F.R. pt. 210 (1988).

without paying exchange, a number of banks continued to charge exchange. State law prohibited them from doing so when the check was presented over the counter, but they could impose the charge when checks drawn upon them were presented through the mail.²² These banks were generally small, rural institutions predominantly, but not exclusively, located in the South.²³ The Fed, fully persuaded that its mission included the creation of a universal par collection system, took aggressive action against the recalcitrant banks. If cajolery and threat proved unavailing, the Fed would gather all checks drawn upon the non-par bank and employ an agent to present these checks over the counter.²⁴ As one Federal Reserve employee, perhaps inspired by the gunboat diplomacy of the era, explained, when threatening a rural bank with this possibility, "the Federal Reserve System was like a mighty battleship coming up as it were from a smooth sea, and all banks that did not affiliate with it could not stand its swells and must get in its wake for safety."²⁵

The non-par banks resisted by every means available. They resorted to the bankers' old trick of paying checks presented over the counter in small coins,²⁶ but they also introduced bills in Congress, obtained legislation changing the common law to require exchange charges on over-the-counter transactions, brought litigation against the Fed, and organized the National and State Bankers' Protective Association to represent their interests.²⁷ State legislation proved the most effective tactic. Laws mandating exchange charges were enacted in eight states, mainly in the South,²⁸ and their constitutionality was upheld by the Supreme Court in 1923.²⁹ Although the Court held that the Fed's over-the-counter presentations did not, by themselves, violate the Federal Reserve Act, it also held that the Act did not pre-empt the state legislation. This ended the Fed's ability to compel par collection; it could refuse to collect checks drawn on non-par banks, but it could no longer present these checks over the counter and demand full payment. Despite this defeat, the practice of

22. W. SPAHR, *supra* note 17, at 105–09; Scott, *supra* note 17, at 741. In addition, direct presentment through the mail was regarded as negligent, because it placed the drawee in the position of acting as its own agent for collection. See *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N.W. 980 (1899); *Merchants' Nat'l Bank v. Goodman*, 109 Pa. 422, 2 A. 687 (1885). Thus, a bank that could not present over the counter, or through a clearinghouse, was virtually obligated to use another bank as a collection agent. This bank would then charge a fee for its collection services; the depository thus avoided liability for negligence, but remained subject to the fee. The only way to avoid this fee was to establish a correspondent relationship with the presenting bank. It was this search for correspondents that led to circuitous routing.

23. W. SPAHR, *supra* note 17, at 243–46. By 1921, the only states with banks that had not been enrolled on the Fed's "par list" were Southern or Border states.

24. See *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 355–56 (1921); *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 286 F. 610, 612–16 (E.D. Ky. 1922); *Brookings State Bank v. Federal Reserve Bank*, 277 F. 430, 431 (D. Or. 1921); W. SPAHR, *supra* note 17, at 235, 250.

25. *Farmers' & Merchants' Bank*, 286 F. at 612.

26. W. SPAHR, *supra* note 17, at 250. See *Suffolk Bank v. Lincoln Bank*, 23 F. Cas. 346, 347 (C.C.D. Me. 1821) (No. 13,590).

27. W. SPAHR, *supra* note 17, at 249–56. According to Spahr, a brochure published by the Protective Association argued that "[b]anks have in general . . . but two sources of income—interest and exchange. State banks have the right to these sources of income by virtue of state authority, and the Federal Reserve Board has no right or power to deprive them of one of the sources." *Id.* at 236 (footnote omitted).

28. See *id.* at 251–52. The eight states that enacted legislation of this sort were Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Dakota, and Tennessee. See *infra* text accompanying notes 125–26.

29. *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649 (1923) (Brandeis, J.) (North Carolina statute not pre-empted by Federal Reserve Act).

charging exchange gradually withered away, leaving little evidence of its quondam controversiality, and the Fed's first effort to federalize the check collection system ended in success.³⁰

As the years passed, the Fed's sense of mission faded somewhat, and it became content to manage its own check collection system, without major efforts to impose its will or style on other institutions. Proposals and innovations tended to come from private groups and to be implemented through state law. In 1928, for example, the American Bankers' Association promulgated its Bank Collection Code, whose check collection rules supplemented the NIL's negotiable instrument rules.³¹ The Code was designed for adoption by the states as a uniform law, but only nineteen states were willing to enact it.³² Greater success was achieved by the Uniform Commercial Code (UCC), a comprehensive recodification of existing uniform acts sponsored by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL).³³ Article 3 of the UCC was a recodification of the NIL; Article 4, a new statute for check collection on which the American Bankers' Association laid a heavy hand,³⁴ bore a remarkable resemblance to the Bank Collection Code.³⁵ Shortly after the UCC was promulgated, and before its widespread adoption, the American Bankers' Association also developed the process of Magnetic Ink Character Recognition (MICR), the odd-looking numbers at the bottom of the check which allow it to be processed and routed by automatic equipment.³⁶ Both the UCC and the MICR system were uniformly adopted as a matter of state law and business practice.

Renewed efforts by the Fed to prescribe rules for other institutions began in the 1970s with the growing concern about the "float." The Fed regularly gave credit for checks presented to it before it had received credit from the payor bank.³⁷ This produced a float in favor of the presenting bank—in essence, an interest-free loan. In 1974 the Fed decided to reduce its float by demanding faster payment by the payor bank, an innovation that survived court challenge.³⁸ Despite this reduction, massive

30. See W. SPAHR, *supra* note 17, at 289–90; Wyatt, *supra* note 19, at 396–97.

31. For the text of this Code and a detailed commentary, see Townsend, *The Bank Collection Code of the American Bankers' Association*, 8 TUL. L. REV. 21, 236, 376 (1933-34). See also Wallace, *Comments on the Proposed Uniform Check Collection Code*, 16 VA. L. REV. 792 (1930).

32. See R. BRAUCHER & R. RIEGERT, *supra* note 14, at xxxvii–xxxix. These states were concentrated in the Northeast and Midwest.

33. On the history of the UCC generally, see Braucher, *Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

34. See, e.g., Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 362 (1952) (Article 4 is "a deliberate sell-out of the American Law Institute and the Commission on Uniform Laws to the bank lobby"); Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364, 374–77 (1952); Leary & Schmitt, *Some Bad News and Some Good News from Articles 3 and 4*, 43 OHIO ST. L.J. 611, 611–14 (1982); Rapson, *Book Review*, 41 BUS. LAW. 675, 675–77 (1988).

35. See Beutel, *supra* note 34, at 358–60.

36. On the MICR system generally, see N. PENNEY & D. BAKER, *THE LAW OF ELECTRONIC FUNDS TRANSFER SYSTEMS* ¶¶ 1.01[2], 1.02 (1980 & D. Baker & R. Brandel Cum. Supp. 1987); B. YAVITZ, *AUTOMATION IN COMMERCIAL BANKING* 15–30 (1967).

37. See 1983 *Joint Hearings*, *supra* note 20, at 384–93; M. MAYER, *THE BANKERS* 140–42 (1974).

38. *Community Bank v. Federal Reserve Bank*, 500 F.2d 282 (9th Cir.), *cert. denied*, 419 U.S. 1089 (1974), *opinion amended by* 525 F.2d 690 (9th Cir. 1975) (describing changes in Regulation J, 12 C.F.R. §§ 210.9, .12).

float against the Fed continued and finally became a subject of congressional concern. In the Monetary Control Act of 1980 Congress, now in a deregulatory mood, instructed the Fed to eliminate the float, so that other providers of collection services could compete against it on more equal terms.³⁹ This legislation could be termed defederalizing, at least in purpose, since it contemplated a reduction in the nationalized check collection system. In a certain sense, however, it had the opposite effect, since it induced the Fed to develop its own rules for the timing of collections, and to impose those rules on the banks with which it dealt.

B. *The Expedited Funds Availability Act*

Shortly after passage of the Monetary Control Act of 1980, a new regulatory initiative emerged. It involved the bankers' practice of placing "holds" on deposited checks, so that customers were required to wait for days, or weeks, before they were able to withdraw their funds. While this practice was hardly new, a sudden surge of consumer complaints about it placed Congress and a number of state legislatures under pressure to take action.⁴⁰ Several state legislatures, notably those in states with strong consumer movements like Massachusetts, New York, California, Illinois, and Connecticut, responded by enacting legislation requiring banks to make funds available within a prescribed period of time.⁴¹ Congress responded by pressuring the Fed, but the Fed was not enthusiastic. It empathized with the banks' concern that they would be exposed to significant risks if they made funds available before they were informed whether the check had been dishonored.⁴² To mollify Congress, the Fed took several actions to accelerate the dishonor and return process, so that banks would be able to make funds available more quickly without risk. It amended Regulation J requiring banks to transmit a notice of dishonor for any check over twenty-five hundred dollars collected through the Fed,⁴³ and it experimented with several devices to facilitate the return of the check itself.⁴⁴ But Congress was not mollified;⁴⁵ it decided upon legislation and passed the Expedited Funds Availability Act in 1987.

39. 12 U.S.C.A. § 248a (West Supp. 1982), amended by 12 U.S.C.A. § 248a(e) (West Supp. 1988). On the Fed's compliance with this statute, see 1983 *Joint Hearings*, *supra* note 20, at 385.

40. See generally *Expedited Funds Availability Act: Hearings on H.R. 2443 Before the Subcomm. on Financial Institutions Supervision, Regulation & Insurance of the House Comm. on Banking, Finance & Urban Affairs*, 99th Cong., 1st Sess. 27-28 (1985) (statement of Rep. Annunzio) [hereinafter 1985 *House Hearings*]; *id.* at 261 (statement of Francis Livingston); Jordan, *Ending the Floating Check Game: The Policy Arguments for Delayed Availability Reform*, 36 *HASTINGS L.J.* 515, 517 n.7 (1985).

41. For a discussion of the state legislation, see Cooper, *Checks Held Hostage—Current Legislation on Funds Availability*, 103 *BANKING L.J.* 4, 4-15 (1986).

42. See 1985 *House Hearings*, *supra* note 40, at 225-26 (statement of Preston Martin); *Expedited Funds Availability Act: Hearings on H.R. 5301 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance & Urban Affairs*, 98th Cong., 2d Sess. 193 (1984) (statement of Preston Martin) [hereinafter 1984 *House Hearings*].

43. See 12 C.F.R. § 210.12(c) (1988).

44. See 1984 *House Hearings*, *supra* note 42, at 197-201 (describing direct return pilot project in Dallas); 1983 *Joint Hearings*, *supra* note 20, at 729-43, 1358-75 (same); Ballen, *supra* note 4, at 38 (describing effort to develop special carrier envelope for returns).

45. See, e.g., 1984 *House Hearings*, *supra* note 42, at 42 ("So it is obvious to me, Mr. Chairman, that the Congress can no longer rely on the banks and the regulators to take meaningful action in this area.") (statement of Senator D'Amato).

The provision of the Act most directly related to the problem that engendered it is its mandatory availability schedule. Checks are divided into several categories, and a time by which funds must be made available is specified for each of these categories.⁴⁶ Banks are required to disclose the schedule, but they are also permitted to make a number of exceptions to it in circumstances when the risk is likely to be high.⁴⁷ The requirements can be enforced by both administrative action and private suit;⁴⁸ the administrative provision, following a well-established pattern, states that violation of the requirements constitutes a violation of the basic regulatory act for each class of depository institutions. In addition, the Act provides that any pre-existing state law that imposes stricter availability standards shall take precedence over the federal law.⁴⁹ This may seem like a concession to the states, but the Act itself contains a policy of increasingly stricter standards,⁵⁰ and of course, the question of strictness will be determined by a federal agency in accordance with federal criteria.⁵¹

Like virtually all federal statutes, the Expedited Funds Availability Act grants an administrative agency, here the Federal Reserve Board, the power to issue regulations that clarify, supplement, and extend the statutory provisions.⁵² The first part of this authorization is exactly what one might expect; it states that the Board shall prescribe regulations "to carry out the provisions of this [Act]," to prevent evasion, and to facilitate compliance. But the section goes on to suggest other regulations that the Fed "shall consider." It lists nine broad categories, most related to the Fed's preferred approach of accelerating the return process. Finally, and apparently as an afterthought, the Act states that "the Federal Reserve System shall have the responsibility to regulate . . . any aspect of the payment system, including the receipt, payment, collection, or clearing of checks."⁵³ Thus, the Fed can now issue regulations that not only govern its own collection system, and not only implement funds availability, but that also deal with any aspect of the payment system as a whole. With a few casually written words, Congress has made still another body of state law subject to federal control.

The Fed's first major regulation issued under the Expedited Funds Availability Act, although certainly not its last, is devoted to the availability problem itself. This Regulation, christened "CC" (Reg CC), fills in a variety of details for the statutory

46. 12 U.S.C.A. § 4002 (West Supp. 1988). There is a temporary schedule, effective September 1, 1988, and a permanent schedule, effective September 1, 1990. See also 53 Fed. Reg. 19,436-37 (1988) (to be codified at 12 C.F.R. §§ 229.11-.12) (Regulation CC, implementing the schedule); Cooter & Rubin, *supra* note 4, at 1142-48.

47. 12 U.S.C.A. § 4003 (West Supp. 1988); 53 Fed. Reg. 19,437 (1988) (to be codified at 12 C.F.R. § 229.13). For example, most of the time limits on availability do not apply to new accounts (less than 30 days), and banks may delay checks if they have "reasonable cause to believe" that the check is uncollectible.

48. 12 U.S.C.A. §§ 4009-4010 (West Supp. 1988); 53 Fed. Reg. 19,435, 19,445 (1988) (to be codified at 12 C.F.R. §§ 229.3, 38).

49. 12 U.S.C.A. § 4007 (West Supp. 1988).

50. *Id.* § 4002(d).

51. 53 Fed. Reg. 19,441 (1988) (to be codified at 12 C.F.R. § 229.20(d)-(e)) (Federal Reserve standards governing pre-emption of state law).

52. 12 U.S.C.A. § 4008 (West Supp. 1988). See Cooter & Rubin, *supra* note 4, at 1148-50.

53. 12 U.S.C.A. § 4008(c)(1)(A) (West Supp. 1988).

rules that establish the availability schedule, require its disclosure, and specify permissible exceptions.⁵⁴ Taken together, these statutory provisions and administrative regulations impose rules on an area previously governed by state law. But this somewhat overstates the case; with the exception of one fugitive provision of the UCC, section 4-213(4), availability was governed by the provisions in the banks' deposit agreements. The only state law involved was the general law of contracts; until the advent of the state funds availability statutes, the states had no particular interest in prescribing rules on this subject.

The remainder of Reg CC is a different matter. Consistent with its concern that earlier availability would lead to increased fraud losses, the Fed has promulgated a number of provisions designed to accelerate the dishonor and return process.⁵⁵ The notice of dishonor requirement, originally restricted to checks collected through the Fed's own system, now applies to all checks over twenty-five hundred dollars.⁵⁶ With respect to the check itself, the Fed's analysis was that the return process should resemble forward collection. Banks have an incentive to collect checks as quickly as possible; the sooner they do so, the sooner they will receive payment for the relatively large amount represented by their daily volume of checks. They have no similar incentive for returns because the amount is small and because they can often charge back the amount of the returned check to the account of the presenting bank before that bank actually receives the check. To counteract this, Reg CC requires that banks return the check to the depositary bank within a specified time or that they handle returned checks as expeditiously as a similarly situated bank would handle forward collection. As the commentary explains this latter provision, if similarly situated banks deliver forward collection checks by courier (for example, a specially hired car service), as opposed to mail, the bank handling a dishonored check must use a courier to return it.⁵⁷ In addition, Reg CC forbids charge-backs. A bank that returns a check can only receive credit after it actually transfers the check to another bank.⁵⁸

To further facilitate the return process, banks handling a dishonored check may route it in a wide variety of ways—to the presenting bank, the depositary bank, any other bank that will handle it expeditiously, or the Federal Reserve, which undertakes to do so.⁵⁹ As a result, the UCC's elaborate mechanism of provisional settlements that become final upon payment by the payor bank has been replaced by a rule that all inter-bank settlements are final, subject to the payor bank's right to obtain reimbursement for a returned item.⁶⁰ The bank may also extend the time required for return under the UCC in a good faith effort to expedite the return.⁶¹ In addition, Reg

54. 53 Fed. Reg. 19,372 (1988) (to be codified at 12 C.F.R. pt. 229); 53 Fed. Reg. 19,436-42 (1988) (to be codified at 12 C.F.R. pt. 229, subpt. B, §§ 229.10-.21) (dealing with the availability of deposited funds).

55. 53 Fed. Reg. 19,442-46 (1988) (to be codified at 12 C.F.R. pt. 229, subpt. C, §§ 229.30-.42). See Cooter & Rubin, *supra* note 4, at 1150-56.

56. 53 Fed. Reg. 19,442-43 (1988) (to be codified at 12 C.F.R. §§ 229.30-.31).

57. 53 Fed. Reg. 19,478-79 (1988) (to be codified at 12 C.F.R. app. E, § 229.30).

58. 53 Fed. Reg. 19,443 (1988) (to be codified at 12 C.F.R. §§ 229.31(c), .32(b)).

59. 53 Fed. Reg. 19,442-43 (1988) (to be codified at 12 C.F.R. §§ 229.30(a), .31(a)); see also 53 Fed. Reg. 19,490-93 (1988) (commentary on Federal Reserve Returned Check Services).

60. 53 Fed. Reg. 19,443 (1988) (to be codified at 12 C.F.R. § 229.31(c)).

61. 53 Fed. Reg. 19,442 (1988) (to be codified at 12 C.F.R. § 229.30(c)).

CC prescribes indorsement standards, so that the check may be sent back more readily to the depository bank, and some special provisions for encoding the depository bank's routing number in MICR on the check.⁶²

As Reg CC explicitly states,⁶³ and as the Fed's commentary explains,⁶⁴ these check return provisions pre-empt significant amounts of the UCC, particularly Article 4. All the Article 4 sections dealing with dishonor and return are modified or displaced by the regulations. The section 4-212(2) authorization of direct return to the depository bank, which is optional under the Code, has become mandatory, thus altering the definition of return in section 4-301(4).⁶⁵ Section 4-212(1), allowing banks to charge-back a returned check, is abrogated; banks must now return the check to the depository bank, or another bank, and await settlement or payment from that bank.⁶⁶ The timing of returns under section 4-301(1) has been altered by the forward collection rule, which will often require a shorter time.⁶⁷ On the other hand, the section 4-301(1) midnight deadline for payor banks can be extended to facilitate expeditious return, and the section 4-202(2) midnight deadline for collecting banks can be extended to allow the bank to encode the depository bank's routing number in MICR.⁶⁸ The Fed's final settlement rule eliminates the references to provisional settlement in sections 4-201(1), 4-211(3), 4-212(1) and (2), and 4-213(2). Other sections are affected as well; the indorsement requirements in sections 3-414, 3-502, 3-503(2), 3-508, and 4-201(2) have been eliminated to make the depository bank indorsement more readily legible,⁶⁹ the notification required when dishonoring a check that is lost or otherwise unavailable for return has been changed,⁷⁰ and the section 4-108(2) list of excuses for delay has been expanded.⁷¹

To be sure, not all the UCC provisions concerning dishonor and return have been eliminated. In fact, Reg CC explicitly adopts a number of them, such as the final payment rule of sections 4-213, 4-302, and 3-418,⁷² the warranty provisions of section 4-207,⁷³ and the measure of damages for losses caused by improper procedure under sections 4-103(5) and 4-202(3).⁷⁴ In the final analysis, Reg CC's general effect is far more significant than any specific changes. The regulation is, for all practical

62. 53 Fed. Reg. 19,444 (1988) (to be codified at 12 C.F.R. § 229.35); 53 Fed. Reg. 19,462 (to be codified at 12 C.F.R. app. D, § 229) (indorsement standards); 53 Fed. Reg. 19,435, 19,443 (to be codified at 12 C.F.R. §§ 229.2(bb), .31(a)(2)) (MICR encoding).

63. 53 Fed. Reg. 19,446 (1988) (to be codified at 12 C.F.R. § 229.41).

64. 53 Fed. Reg. 19,488 (1988) (to be codified at 12 C.F.R. app. E, §§ 229.40-.41).

65. 53 Fed. Reg. 19,479-80 (1988) (to be codified at 12 C.F.R. app. E, § 229.30(a)).

66. 53 Fed. Reg. 19,443 (1988) (to be codified at 12 C.F.R. §§ 229.31(e), .32(b)); 53 Fed. Reg. 19,482-83 (1988) (to be codified at 12 C.F.R. app. E, § 229.32).

67. 53 Fed. Reg. 19,479-80 (1988) (to be codified at 12 C.F.R. app. E, § 229.30(a)). However, U.C.C. §§ 4-301 and 4-302 have not been abrogated and continue to apply as an additional requirement. *Id.*

68. 53 Fed. Reg. 19,479-80 (1988) (to be codified at 12 C.F.R. app. E, § 229.30(a)).

69. 53 Fed. Reg. 19,485 (1988) (to be codified at 12 C.F.R. app. E, § 229.35(b)-(c)).

70. 53 Fed. Reg. 19,480-81 (1988) (to be codified at 12 C.F.R. app. E, § 229.30(f)).

71. 53 Fed. Reg. 19,487 (1988) (to be codified at 12 C.F.R. app. E, § 229.38(e)) (by adding "failure of equipment" and "interruption of computer facilities").

72. 53 Fed. Reg. 19,479, 19,485 (1988) (to be codified at 12 C.F.R. app. E, § 229.30). The midnight deadline for collecting banks in U.C.C. § 4-202(2) is also adopted. This means that there are two timetables for dishonor, with different liabilities attaching to each. 53 Fed. Reg. 19,481-82 (1988) (to be codified at 12 C.F.R. app. E, § 229.31(a)).

73. 53 Fed. Reg. 19,480, 19,484 (1988) (to be codified at 12 C.F.R. app. E, §§ 229.30(b), .35(a)).

74. 53 Fed. Reg. 19,484, 19,487 (1988) (to be codified at 12 C.F.R. app. E, §§ 229.35(a), .38(a)).

purposes, a comprehensive code governing the return process for checks. Its incorporation of certain UCC provisions only emphasizes its status as the primary source of law for this process. From now on, bankers who are designing return procedures, and customers who are suing them, will consult Reg CC and not the Code. The important point, for present purposes, is not that Reg CC changes the law, but that it federalizes the law, whether changed or not.

Reg CC is clearly only the beginning of this federalization process. The Expedited Funds Availability Act authorizes the Fed to promulgate similar regulations for every other aspect of the check collection process. At present, the Fed is considering truncation, a process by which the physical check is held by the bank of first deposit and only electronic messages pass through the system.⁷⁵ A regulation implementing this procedure would clearly displace most of the remaining provisions in Article 4. Articles 3 and 4 are currently being revised to take account of modern technology, and the new versions will certainly permit truncation as well.⁷⁶ But the Fed will probably not be content to rely on mere permission, even in the unlikely event that this revision could be promulgated and enacted by the fifty states in anything less than a decade. It will probably want to promote truncation in some active fashion, and the payment system can look forward to another massive regulation on this subject.

II. UNIFORMITY

With this history in mind, the central question can be asked: what has motivated this extensive federalization of the check collection system in the midst of an era filled with encomia to states' rights and deregulation? One can begin by rejecting the most obvious explanation. The need for uniformity cannot, by itself, be the motivating factor. Hardly anyone would dispute the importance of uniformity for check collection law. Every year, billions of checks are collected across state lines; if state laws differed, processing costs would be higher, delays more frequent, and dispute resolution more complex. But the history of the last century makes clear that the demand for uniformity can be readily satisfied by state law. The NIL and its successor, Articles 3 and 4 of the UCC, were adopted by every state⁷⁷ and, until 1987, served as a comprehensive code for the check collection system. There have been non-uniform amendments in some states, but these have been fairly limited and have not seriously disturbed the general pattern of uniformity. Nor is check collection unique; in addition to the other fields covered by the UCC, a number of other uniform state laws have been enacted widely, and the Restatements, while they lack binding legal force, have exercised a strongly unifying effect on state court decisions.

The ability of the states to achieve uniformity without a centralized or

75. See, e.g., A. LIPIS, T. MARSHALL & J. LINKER, *ELECTRONIC BANKING* 91-102 (1985); N. PENNEY & D. BAKER, *supra* note 36, ¶¶ 2.01-.03; Penney, *Bank Statements, Cancelled Checks, and Article Four in the Electronic Age*, 65 MICH. L. REV. 1341 (1967).

76. See generally Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC*, 43 BUS. LAW. 621 (1988). On the effort to permit truncation, see *id.* at 632-38.

77. See R. BRAUCHER & R. RIEGERT, *supra* note 14, at xxxvii.

hierarchical authority is not surprising. Bodies of rules are often developed by non-authoritative actors and then proposed to the decisionmakers as a recommendation based on expertise. Most legislation is drafted in this way; the wording originally comes from one legislator, or from staff members, or from a private group. Of course, it is more difficult to obtain support from fifty legislatures than from one, but the process is functionally similar. A single legislature or a hierarchy of command makes things easier, but it is not necessary to obtain uniform consent, unless other impediments besides the mere multiplicity of decisionmakers intervene.

There is, however, one important limitation on the level of uniformity that can be achieved without a hierarchical authority. Articles 3 and 4, like all other uniform enactments, are a set of verbal rules. They exist as texts, and the guidance they provide consists only of written words. The familiar difficulty with such texts is that they must be interpreted in order to be applied in specific situations. Inevitably, these interpretations will vary, and the variations will decrease uniformity. With a single hierarchical decisionmaking body, uniformity can be maintained, even if its decisions are no better, or no more predictable, than the individual decisions in a federal system.

There are at least two possible responses to this difficulty. The first is to write the rules in a manner that minimizes interpretive difficulties, a goal to which many aspire, but very few achieve. Often the instinct is to increase the specificity of the rules, but excessive detail can be as bewildering as the vagueness it was intended to resolve. The UCC adopts the useful strategy of stating its rules on two levels: a formal rule that is intended to have binding force and a more chatty commentary that serves as an interpretive guide. This indicates a fair degree of sophistication, but it has not eliminated the variability of interpretation. Reality has a way of presenting problems that the rulemaker did not and often could not have anticipated, while words have an annoying tendency to liquefy and flow under the pressure of events. In terms of Articles 3 and 4, *Perini Corp. v. First National Bank*⁷⁸ is a classic example of the former problem, while *West Side Bank v. Marine National Exchange Bank*⁷⁹ represents the latter. In addition, the inherent uncertainty of language leaves room for its manipulation if the interpreter's sense of policy or justice differs from that of the drafters. The judicial construction of section 3-419(3) is certainly Exhibit A for this proposition.⁸⁰

78. 553 F.2d 398 (5th Cir. 1977). The case involved a "double forgery," where the malefactor forged both the drawer's signature and, apparently, the payee's indorsement. Article 3's loss allocation provisions are simply not drafted with this situation in mind; the result, as the Court pointed out, was a "series of complex commercial paper conundrums." *Id.* at 399.

79. 37 Wis. 2d 661, 155 N.W.2d 587 (1968). U.C.C. § 4-109 states that the "process of posting" includes, *inter alia*, "correcting or reversing an entry or erroneous action." A drawee bank has finally paid a check when it completes the process of posting, or when its midnight deadline arrives, whichever comes first. The question is whether the bank can reverse an entry at any time up until the midnight deadline and claim that it has not completed the process of posting. The court held that it can, and it has been roundly criticized. *See, e.g., Malcolm, Reflections on West Side Bank: A Draftsman's View*, 18 CATH. U.L. REV. 23 (1968); Rohner, *Posting of Checks: Final Payment and the Four Legals*, 23 BUS. LAW. 1075 (1968).

80. *See, e.g., Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609, 107 Cal. Rptr. 1 (1973); *Salsman v. National Community Bank*, 102 N.J. Super. 482, 246 A.2d 162 (1968); *Ervin v. Dauphin Deposit Trust Co.*, 38 Pa. D. & C.2d 473 (1965). Section 3-419(3) apparently prohibits a defrauded payee from suing the one depository bank where the thief

The second response to the uncertainties of interpretation is to establish a single decisionmaker who can resolve contested questions. Its decision may not be correct—whatever that means—but it will at least be uniform. This solution may seem to be inconsistent with federalism, and with a regime of state law, because it depends upon a centralized authority. Federalism, however, is not equivalent to separatism; it is a means of allocating authority within a unified state and can thus make use of collective resources.

The collective resource that seems handiest in providing uniform answers for conflicting interpretations of state law is the Supreme Court of the United States. For many years, the Supreme Court fulfilled this role, particularly in the commercial field, by deciding state cases on the basis of general common law. But in 1938 in *Erie Railroad Co. v. Tompkins*,⁸¹ the Court relinquished this authority and declared that no such thing as general common law existed. The decision, ironically, came at a time when a different kind of general law was becoming an operational reality. The uniform acts, of which the NIL was only the first, had established binding rules for large areas of commercial law,⁸² while the Restatements were simultaneously articulating advisory rules that covered virtually every area of common law and were achieving wide acceptance.⁸³

But this process was perceived as a substitute for a centralized adjudicator, rather than a predicate for it. State court constructions of statutory law had been excluded from the general common law in *Swift v. Tyson*,⁸⁴ and in 1934 this exclusion was extended to the NIL, despite its uniform character.⁸⁵ What was not perceived was that the growth of uniform codes, whether enacted or advisory, provided just the sort of generally applicable legal principles that had previously been thought to underlie the common law. This could have served as a basis for Supreme Court resolution of interpretive variations among state decisions. In other words, while the vision of a general common law, to which all civilized peoples subscribed, had faded quite a bit by the 1930s,⁸⁶ the alternative vision of uniform state codifications, or state court decisions guided by uniform codes, was rapidly

(usually a dishonest bookkeeper) took all the checks and requires suit against the multitude of drawee banks. This discourages legitimate suits and wastes resources, particularly since the depositary bank usually bears the final liability. Courts have shown great ingenuity in avoiding the provision's language.

81. 304 U.S. 64 (1938).

82. By 1938, two uniform acts, the NIL and the Bulk Sales Act, had been adopted in every jurisdiction; the Uniform Sales Act had been adopted in 35, the Uniform Warehouse Receipts Act in 47, and the Uniform Bills of Lending Act in 31. See R. BRAUCHER & R. RIEGERT, *supra* note 14, at xxxviii-xxxix.

83. On the Restatements in general, see J. HONNOLD, *THE LIFE OF THE LAW* 144-80 (1964); Goodrich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449 (1936); Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITTS. L. REV. 795 (1959).

84. 41 U.S. (16 Pet.) 1, 18-19 (1842).

85. *Burns Mortgage Co. v. Fried*, 292 U.S. 487 (1934); *Marine Nat'l Exch. Bank v. Kait-Zimmers Mfg. Co.*, 293 U.S. 357 (1934).

86. This is the basis of Judge Friendly's criticism of *Swift*:

[W]hatever degree of uniformity was attained under *Swift v. Tyson*, reckonability was small. One trouble was that the body of federal "general" law was so meager. Prediction at the planning stage was nigh impossible since a lawyer could rarely tell whether the issue would be litigated in a state court, where the governing rule was well established, or in a federal court, where it had not been.

Friendly, *In Praise of Erie - and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 406 (1964). Clearly, this criticism would not apply to Supreme Court constructions of the UCC.

emerging. Supreme Court resolution of conflicting decisions under these codes would have been an aid to "our federalism," not a defeat for it. They would not have displaced state power, since the decisions would not have been rendered under the supremacy clause.⁸⁷ But they would have provided standard interpretations that state courts could choose to follow because they were persuaded by rationale or because they valued uniformity.

Given the Supreme Court's unwillingness to resolve interpretive issues of state law, the demand for uniformity could also have been satisfied by an unofficial or specially authorized panel. The natural organizations to maintain such a panel, in the case of the UCC, would be the sponsoring organizations—the ALI and NCCUSL. The ALI, sponsor of the Restatements, as well as the primary sponsor of virtually all the uniform state laws, is a private organization of the bar, whose membership consists of judges, practitioners, and academics.⁸⁸ NCCUSL is a quasi-official entity, consisting of representatives appointed by each state.⁸⁹ Either organization could readily establish a panel of academics, retired judges, or others who do not have a direct economic stake in the proceedings to issue interpretive opinions. The panel could act on its own initiative or in response to questions certified to it by state judges. These opinions would not be binding, of course, but they might well carry considerable authority, particularly if the drafter of the statute were involved. However, neither organization has chosen to act in this way. The ALI has created a Permanent Editorial Board for the UCC,⁹⁰ but its purpose is to consider new statutory provisions, not to issue interpretations of the existing ones.

Despite this absence of a single interpreter, the UCC remains a reasonably uniform body of law, and thus it is a good example of the way in which a federal system can satisfy the need for uniformity. Courts are generally conscious that they are interpreting a uniform statute and pay attention to the decisions of other jurisdictions. Scholars write about the UCC as it was promulgated by the ALI, and their works have produced a general understanding of the interpretive issues that furthers uniformity. In addition, the statutory revision efforts, while slow and rather awkward, are capable of resolving the most serious problems. Article 9 of the UCC has been extensively revised, and a new article, designated 2A, was recently promulgated to deal with the previously uncovered area of chattel leasing.⁹¹ With respect to the payment system, Articles 3 and 4 are being comprehensively revised at the present time.⁹² The revision is designed to resolve some of the interpretive conflicts and linguistic ambiguities that have arisen during the three decades of the statute's operation and to add new provisions that address technological advances during that period.

87. See Fletcher, *supra* note 11, at 1517–27.

88. See generally H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE* (1961); Lewis, *History of the American Law Institute and the First Restatement of the Law*, "How We Did It," in A.L.I. *RESTATEMENT IN THE COURTS* 1 (1945).

89. See F. BEUTEL, *supra* note 13, at 73–74 (formation of NCCUSL's predecessor).

90. On the work on the Permanent Editorial Board, see Schnader, *The Permanent Editorial Board for the Uniform Commercial Code: Can it Accomplish Its Object?*, 3 AM. BUS. L.J. 137 (Fall 1965).

91. See *Symposium: Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988).

92. For a summary of the proposed revisions, see Rubin, *supra* note 76.

In other words, the need for uniformity does not provide a reason for the federalization of the law. An adequate level of uniformity has been achieved through uniform acts adopted by each state legislature and interpreted by largely sympathetic judges. Additional uniformity could be achieved with some sort of centralized, non-authoritative interpreter sufficiently prestigious to merit consideration and to be followed in most cases. But even in the absence of that device, the body of state law can be kept sufficiently coordinated for most practical purposes.

III. REGULATION

A different situation arises, however, if the felt need for uniformity is linked to a felt need for regulation. Federalization will then prevail because uniform regulation is largely impossible under a system of state law. The states can join together to establish uniform laws, and they can regulate within their borders, but they cannot regulate uniformly. Thus, it was Congress' regulatory agenda that led it to federalize check collection.⁹³

Congress' federalizing inclinations can be partially attributed to its status as a federal legislature, of course, but treating that fact as a complete explanation requires too heavy a dose of conspiracy theory. The federal takeover of state law has not been a particularly popular political position in recent years, and Congress is inhabited by politicians, after all, and not by federally appointed officials. Moreover, the Supreme Court, which does consist of federally appointed officials, has been less definitive in its direction. In addition to its well-known flip-flop in *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁴ its affection for laissez-faire economics has caused the Court to adopt opposing positions on federalism in the economic realm.⁹⁵ Congressional support for federalization, therefore, is not simply a power grab by a national decisionmaker, but an outgrowth of its substantive policies.

The political reasons why Congress decided to regulate the payment system, and for the growth of regulation in general, lie outside the scope of this discussion. Whether the members were acting in the interest of public policy or maximizing their chance of re-election,⁹⁶ whether they were saving America or wasting it, is not directly relevant for present purposes. The question here involves the nature of regulation and its connection with the federalization of state law.⁹⁷ For these

93. For descriptions of federalization resulting from the activities of federal regulatory agencies, see Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 VA. L. REV. 813 (1984); Ballen, *supra* note 4, at 37-42 (actions of payment systems regulators prior to Expedited Funds Availability Act); Fleischer, "Federal Corporation Law": An Assessment, 78 HARV. L. REV. 1146 (1965); Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984) (health and safety legislation).

94. 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

95. See, e.g., Buxbaum, *Federalism and Company Law*, 82 MICH. L. REV. 1163 (1984) (anti-federalism stance on state takeover laws); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227 (1987) (pro-federalism stance on state action exception to federal antitrust law).

96. For the view that the growth of the federal bureaucracy results from legislators' desire to provide themselves with more opportunities to intervene with that bureaucracy on behalf of constituents, see M. FIORINA, *CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977).

97. The growth of a regulatory regime per se is insufficient to account for the federalization process, since the states are fully capable of regulation. This is recognized by Samuel Beer, who relies heavily on the bureaucratization process

purposes, it will be sufficient to identify the distinguishing features of a regulatory regime: a different, more operational set of rules, the use of ongoing supervision or enforcement, and the ability to revise the rules on a regular basis. The perceived need to exercise these functions, and to preserve the uniformity of law, generates the process of federalization, no matter what the intentions or the ideology of the decisionmakers.

A. *Operational Rules*

The Expedited Funds Availability Act can generally be described as a regulatory statute. Strictly speaking, however, it is not so much a regulatory statute as a statute authorizing regulation. The statute empowers an administrative agency, the Federal Reserve Board, to take a certain range of actions that we associate with regulation; one of these is to issue a set of supplementary rules, which we refer to in ordinary parlance as "regulations." The nature of statutory authorization can be quite specific or it can be left quite vague. The Expedited Funds Availability Act, like many modern statutes, adopts both approaches; it specifies certain regulations that the Fed must adopt, and it authorizes, without requiring, an extremely broad range of others.⁹⁸ Thus far, the Fed has focused mainly on regulations that are specified and required by the Act, but its dishonor and return rules, although closely tied to the availability problem, reflect a certain amount of initiative. The Fed's ability to develop new sets of standards, which expand the reach of the Act, will almost certainly be accentuated in the ensuing years.

A glance at Reg CC reveals that its rules are stated in a qualitatively different manner from the rules that one would generally find in a statute. They are more detailed, of course, but they have an additional quality that is not adequately captured by the concept of detail. This is their operational character, their concern with the pragmatic and technical features of the process that they regulate. Statutes tend to define the rights and obligations of the relevant parties. They can be heavily, sometimes maddeningly detailed, but the detail tends to provide further specifications of those same rights and obligations. Reg CC is different; it tells banks precisely how they are to go about their daily operations. It deals with courier runs, MICR encoding, the placement of indorsement stamps, and a variety of other topics that seem quite remote from legal rights or common law rules. If the legislature wants to impose rules of this nature—if it wants to manage the daily operations of a field—it must generally rely on an administrative agency.

There is no theoretical reason why operational rules cannot be drafted by a legislature, but they rarely are. Perhaps the most familiar explanation is that drafting

for his account of federalism's decline. As he points out, the bureaucratization process generates "topocrats," that is state and local power holders, as well as centralized technocrats, and thus leads to an intergovernmental mixture of power. See Beer, *supra* note 9; Beer, *The Modernization of American Federalism*, 3 *PUBLICUS* 49, 75–80 (1973) [hereinafter Beer II]. But what then accounts for the federalization process itself? As suggested below, the answer lies in the nature of regulation.

98. See Cooter & Rubin, *supra* note 4, at 1148–52.

such rules requires a higher level of technical expertise.⁹⁹ To specify the details of bank operations, or the precise timing and location of required disclosures, one must know a good deal about the day-to-day functioning of the payment system. A legislature is unlikely to acquire such information and, if it is acting responsibly, even less likely to be sure it has acquired the correct information, given the tendentious nature of its informants. An administrative agency will generally be much better informed, because it has continuous contact with the industry it regulates. The Federal Reserve has the additional advantage of operating its own check collection network, but even without such direct involvement, an agency's familiarity with a given industry will always be much greater than the legislature's.

Both judges and scholars have expressed much doubt, of late, about the reality of agency expertise.¹⁰⁰ But the term "expertise" can mean two different things. If it means the ability of the agency to achieve large-scale results, these doubts are unfortunately well justified in many circumstances. But expertise can also refer to the agency's ability to talk the same language as its regulatees and to participate in their forms of life. The agency's possession of this kind of expertise is difficult to deny. A layperson, or a legislature, simply could not promulgate detailed rules about the operational aspects of the check collection system. How could they even talk about courier runs or the placement of indorsement stamps in any comprehensible way—indeed, how would they even think in these terms—without direct, ongoing experience?¹⁰¹

Legislatures not only lack the expertise to draft operational rules, but they also lack the time and energy. A legislature will have general jurisdiction over an area covered by dozens or hundreds of administrative agencies, as well as over all other areas that are potentially subject to regulation, but not yet regulated. The division of labor, a necessary organizing principle for any modern state, demands that the great bulk of detailed rulemaking be performed by agencies. The only other alternative would be for the legislature to bureaucratize itself, to add so many staff members, and so many levels of command, that it would reproduce the structure of the agencies it was attempting to replace.

A final explanation why legislatures do not draft operational rules is that it seems inappropriate for them to do so. The concept of propriety may appear rather vague in this context, but social institutions, like individuals, are heavily influenced by role

99. See Beer II, *supra* note 97, at 74–80 (technocratic politics).

100. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (Leventhal, J.); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

101. See J. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 98–99 (F. Hayek ed. 1962):

I do not mean that the transaction of public business has esoteric mysteries, only to be understood by the initiated. Its principles are all intelligible to any person of good sense, who has in his mind a true picture of the circumstances and conditions to be dealt with: but to have this he must know those circumstances and conditions; and the knowledge does not come by intuition. There are many rules of the greatest importance in every branch of public business (as there are in every private occupation), of which a person fresh to the subject neither knows the reason nor even suspects the existence, because they are intended to meet dangers or provide against inconveniences which never entered into his thoughts.

considerations. Legislatures generally act by declaring legal rights or by issuing assignments to administrative agencies. The dignity of rights declaration rests upon tradition; when courts were the only mechanism for enforcing the law, declarations of rights were the only regulatory laws that legislatures could enact. Thus, declarations of rights hark back to the formative era of our social institutions, the era from which we still derive our notions of grandeur and dignity. The dignity of broad assignments is even older, in one sense, and also more contemporary. It is the dignity of the king, but also of the manager—in general, it is the role of the superior, the boss, who is concerned with matters of broad policy, rather than grimy detail. Thus, the legislature, as the superior rulemaking unit of government, properly declares rights and issues assignments, but leaves the drafting of operational rules to its subordinate agencies.

In fact, a rather interesting stratification exists even within the regulations promulgated by the Federal Reserve Board under the general authorization of the Expedited Funds Availability Act. The Fed's standards for indorsement, a set of fearfully technical provisions about how and where the automatic processing machinery may stamp a check, do not appear in the regulation itself—neither does the list of routing numbers for checks, nor the model disclosure forms that the Fed is required to provide. Instead, all three appear as appendices.¹⁰² They were presumably regarded as too detailed and technical for the regulation, just as the material in the regulation would generally be regarded as too detailed and technical for a statute.

In short, there seems to be an instinctive, cultural understanding about the kinds of rules that should appear in different formats. While there is nothing in our legal theory that prohibits a legislature from enacting operational rules, or even lists of routing numbers, the task is usually assigned to an administrative agency. And if these provisions are to be uniform, that agency must be a federal one.

B. Enforcement

In addition to their ability to promulgate different kinds of rules, regulatory agencies are also able to employ different methods of enforcement. The UCC is enforced exclusively by courts; since it is a commercial statute rather than a criminal statute, suits are initiated by private parties. The system of judicial enforcement that results is too familiar to summarize,¹⁰³ but what is important, for present purposes, are the limitations that such a system imposes. If different methods of enforcement are desired, and if the pattern of enforcement is to be reasonably uniform, the law must rely on a single administrative agency. This means a national administrative agency, which further contributes to the process of federalization.

The most familiar limitation on judicial enforcement is that private parties will

102. 53 Fed. Reg. 19,446–62 (1988) (to be codified at 12 C.F.R. app. A–D, § 229).

103. Generally speaking, the limits on courts are those that are inherent in the adjudicatory process. See M. SHAPIRO, *COURTS* 1–64 (1981); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). Some observers believe that there should be additional limits, based on the particular character of courts as institutions. See generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 22–67, 255–98 (1977); Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

only initiate the process when a lawsuit lies within their private interest and they have the means to do so. Because of the fixed costs of litigation, many violations of the prevailing legal rules cannot be profitably enforced, especially when one discounts the potential recovery by the possibility of losing.¹⁰⁴ In addition, certain types of private parties, generally known in legal discourse as consumers, individuals, or natural persons, may not pursue even those lawsuits that are profitable because of their lack of familiarity with the legal system.¹⁰⁵ An agency, in contrast, can be proactive,¹⁰⁶ initiating enforcement efforts as a matter of governmental policy. These enforcement efforts can be designed to pursue a given infraction of the rules, without being justified by the potential return in any particular case. Moreover, since agencies are professional enforcers, they are certainly not subject to the social and cultural constraints that afflict consumers. Of course, the agency may not choose the optimal enforcement strategy, but it is not precluded from achieving that strategy by structural constraints in its method of initiating the enforcement process.

Another limitation on judicial enforcement is its unwieldiness. Civil trials are slow and expensive, of course, but there is no inherent reason why they must be more expensive than the equivalent administrative process. Agencies must often go to court to enforce their orders, but even if the agency is empowered to make factual determinations and impose punishments on its own, it is generally required to provide the same sorts of procedural protections that the judiciary does. The real problem is that the judiciary generally cannot fashion an enforcement strategy. It must treat each litigated case as a separate event, ignoring the defendant's past history, prior violations, and general demeanor. Agencies can take all these factors into account, at least at the stage of initiating enforcement. Consequently, they can pursue the sorts of strategies that recent enforcement and compliance literature regards as optimal. The literature suggests, for example, that an agency can maximize compliance by prosecuting all infractions by companies with an ongoing record of intransigence, while ignoring similar infractions by their more compliant compatriots.¹⁰⁷ Only an agency can implement a strategy of this nature.

Closely related to the agency's ability to implement a conscious enforcement strategy is the range of devices that it can employ as aspects of this strategy. Judicial enforcement is restricted to litigated cases. Theoretically, it is further restricted to an all-or-nothing decision in favor of one litigant. While the settlement conference affords an opportunity for compromise solutions, as well as for a range of informal

104. See, e.g., Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 284-93 (1973).

105. See, e.g., A. BEST, WHEN CONSUMERS COMPLAIN (1981); Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701 (1977); Levine & Preston, *Community Resource Orientation Among Low Income Groups*, 1970 WIS. L. REV. 80; Steele, *Fraud, Dispute and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1122-26 (1975).

106. See R. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 27-35 (1980) (contrasting reactive and proactive styles of prosecution).

107. See, e.g., E. BARDACH & R. KAGAN, GOING BY THE BOOK (1982); K. HAWKINS, ENVIRONMENT AND ENFORCEMENT (1984); Scholz, *Discretion and Enforcement Efficiency: Problems of Complexity, Contingency, and Corruption*, in ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION 145 (D. Shumavon & K. Hibbeln eds. 1986); Scholz, *Cooperation, Deterrence and the Ecology of Regulatory Enforcement*, 18 LAW & SOC'Y REV. 179 (1984).

strategies such as the division of the loss between the parties,¹⁰⁸ the judge's efforts are necessarily bounded by the existence and subject matter of the case. An agency, in contrast, can do much more than bring formal enforcement proceedings. It can cajole, negotiate, inspect, publicize, grant or withhold benefits, accelerate or delay approvals, and generally make life pleasant or unhappy for those subject to its power.

The Expedited Funds Availability Act sets this administrative enforcement into motion. It imposes civil liability for violation of its terms, using the now standard formula of federal consumer legislation.¹⁰⁹ But, it also declares that any violation of its provisions constitutes a violation of the organic statute of the federal regulatory agency that regulates the financial institution in question.¹¹⁰ With respect to commercial banks, violations by national banks can be prosecuted by the Comptroller of the Currency under the National Bank Act, violations by state banks that are members of the Federal Reserve System can be prosecuted by the Fed, and violations by state non-member banks that have federal insurance, as virtually all do, can be prosecuted by the FDIC.¹¹¹ These agencies examine the banks they regulate, and compliance with the Expedited Funds Availability Act is now potentially within the ambit of those examinations. Moreover, the Act grants the Federal Reserve Board general power to enforce the Act by excluding any noncomplying institution from the payment system.¹¹² Since imposition of this sanction would instantaneously destroy any depository institution in America, it represents a rather formidable grant of power, whether the Fed chooses to make use of it or not.

The Fed did not specify an administrative enforcement scheme in Reg CC,¹¹³ and its apparent intention is to rely upon private enforcement of the statute. In fact, the Fed has gone out of its way to conform the damages in these private suits to the damages available in suits under the UCC.¹¹⁴ This choice probably reflects the Fed's own ambivalence about the value of the Act; the congressional proponents of the Act may well have envisioned a more proactive enforcement scheme, and they certainly authorized such an approach.

Even if the Fed continues its role as a reluctant dragon, the primary enforcement mechanism is likely to be administrative. The Act's protections apply mainly to consumers and small businesses, since other depositors are likely to be quite aware

108. See, e.g., Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 Nw. U.L. REV. 750 (1964); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 386-414 (1982); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

109. 12 U.S.C.A. § 4010 (West Supp. 1988). The formula comes from the Consumer Credit Protection Act (Truth in Lending Act) § 101, 15 U.S.C. § 1640 (1982), as it has been amended over time. In essence, it provides for statutory damages plus attorney's fees.

110. 12 U.S.C.A. § 4009(b)(1) (West Supp. 1988).

111. *Id.* § 4009(a)(1)(A)-(C).

112. *Id.* § 4009(c)(2).

113. See 53 Fed. Reg. 19,435-36 (1988) (to be codified at 12 C.F.R. § 229.3), which essentially restates § 4009 of the Act with elaboration. There is no commentary on this section, although the Fed has provided extensive comments on virtually all other sections of its regulation.

114. 53 Fed. Reg. 19,445 (1988) (to be codified at 12 C.F.R. § 229.38(a)) (stating same measure of damages as U.C.C. § 4-103(5), in virtually the same language). See 53 Fed. Reg. 19,484, 19,486-87 (1988) (to be codified at 12 C.F.R. app. E, §§ 229.34(b), .38)).

of the funds availability issue and many have cash managers who are more than a match for bank executives.¹¹⁵ But consumers and small businesses are unlikely to hazard complex litigation over the courier routes and indorsement procedures of the banks in the collection chain simply because a few of their checks have been improperly dishonored. If banks obey the Act's provisions, and they probably will, it will not be because they fear such suits. Rather, they will do so because they are reasonably law-abiding, and because they do not want to disobey an explicit directive of the Federal Reserve Board. The Fed simply has too many formal and informal enforcement resources to be treated in this manner.¹¹⁶ Over time, moreover, the Fed is likely to move toward using some of those resources. An irritated telephone call, a few denials of access to the discount window, or a few inquiries in the process of its regular examination are likely to be all the Fed will need to bring some particularly careless or intransigent institution into line, even without resorting to nuclear weaponry like exclusion from the payment system.¹¹⁷ If the Fed is disinclined to take such actions on its own, some challenging questions from a few members of its congressional oversight committees will probably provide the needed motivation. The Act, therefore, unleashes the dynamics of regulatory enforcement, no matter what the preferences of the regulatory agency that serves as the instrumentality of this process.

A final question is whether the desire for the proactive, modulated pattern of administrative enforcement is necessarily a federalizing tendency. State governments, after all, are also administrative in nature, and one can imagine a revised UCC that relied on state administrators, rather than state courts, for its enforcement. The difficulty, however, is that uniformity would be impossible to achieve with such a statute. To begin with, the very nature of administrative enforcement is too variable and discretionary to be uniformly applied unless one hierarchical agency is in charge. There are too many decisions to be made about the level of enforcement, the method of selecting targets, the kinds of devices that will be employed, and the method for determining compliance. Judicial enforcement can be implemented in a relatively uniform manner by different judicial systems because judges' tasks are more delimited, and their roles are better defined. Second, state administrative agencies themselves exhibit a great deal of variability. If the UCC attempted to address state administrative agencies, rather than state courts, it would be speaking to a wide variety of different agencies, with different jurisdictions, different organizational structures, different approaches to their role, different staffing patterns, and different positions within their governments. State courts, in contrast, are quite similar in structure, training, and approach. Their response to a particular statute is likely to be relatively similar, and their professional ties allow them to communicate quite readily

115. The recent E.F. Hutton scandal, while presumably not typical behavior for this new profession, certainly indicates its level of skill. See generally *E.F. Hutton Mail and Wire Fraud Case: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 1-1216, 1219-1912 (1985).

116. See generally T. DE SAINT PHALLE, *THE FEDERAL RESERVE: AN INTENTIONAL MYSTERY* (1985); W. GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* (1987).

117. On the discretionary use of the discount window, see M. STIGUM, *THE MONEY MARKET* 198-204 (1978); M. MAYER, *supra* note 37, at 210-26.

with one another. This difference between courts and agencies may be historical rather than inevitable, but in the contemporary context it provides another reason why a uniform, proactive enforcement policy requires a federal agency.

C. Program

The final feature that distinguishes a regulatory regime from a judicial one is the regulator's ability to develop and implement a program. A program is simply a series of coordinated actions taken over time, which tend toward some identifiable result. Courts do not generally engage in programmatic action. While their decisions, when viewed with hindsight, can sometimes be reconstructed as a program, they are rarely perceived as such at the time of each decision and are even more rarely planned in advance. The areas in which judicial action displays some programmatic features are constitutional law and common law, where the courts act independently of the legislature. Statutory cases are the least programmatic because they exist within a pre-established structure. If a legislature wants programmatic action, it will rarely choose the judiciary for this purpose; instead it is likely to rely on an administrative agency. Here again, the joint desire for programmatic action and for uniformity can only be satisfied by a single, necessarily federal agency.

Programmatic action can be divided into two main categories. The first is a relatively delimited program of keeping statutory rules up to date. Within limits, specifically sub-programmatic limits, courts can fulfill this function by interpretation. As changes proliferate, however, the rules themselves must change if they are to serve the purposes of the original legislation. Comprehensive adaptation of the rules, or the extension of them to some new domain, constitutes a program. In the check collection system, the advent of computer processing was the sort of change that demanded a programmatic response. The language of the UCC was already fixed, however, and the adaptation required could not be planned or implemented by the courts. With no centralized agency available, the task fell to the American Bankers' Association, which developed the MICR system.

The second type of program is a new initiative, bearing no direct relationship to prior rules. In essence, it is an innovation, rather than an adaptation. Such initiatives can be undertaken by the legislature, of course, and we have a good many doctrinal and political arguments lying about that seem to insist that only the legislature may do so;¹¹⁸ however, this is hardly a realistic demand, whatever its doctrinal or traditional appeal. Congress, for example, cannot be expected to turn its attention to the payment system more than once a decade, and most people would agree that it should not do so, given its other responsibilities. Innovations may be desirable, or even necessary, much more frequently. In that case, the legislature will want to assign the power to develop innovative programs to some other governmental body.

118. See generally J. FREEDMAN, *CRISIS AND LEGITIMACY* (1978); T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1 (1982); Levi, *Some Aspects of Separation of Powers*, 76 *COLUM. L. REV.* 371 (1976); Schoenbrod, *The Delegation Doctrine: Could the Courts Give It Substance?*, 83 *MICH. L. REV.* 1223 (1985).

This was precisely and explicitly what Congress did in the Expedited Funds Availability Act. It wanted its stated rules to be adapted in a continuous but coordinated fashion. Thus it provided that "the Board shall, by regulation, reduce the time periods established under [the Act] to as short a time as possible."¹¹⁹ More generally, this adaptation process is certainly what the Act's proponents meant when they provided that "the Board shall prescribe regulations . . . to carry out the provisions of this [Act]."¹²⁰ But Congress also wanted innovative programs that set rules in areas beyond the limits of the Act's particular provisions. It, therefore authorized the Fed to provide for check truncation and to establish an electronic clearinghouse system.¹²¹ The apparently redundant language in the Act is a function of these different programmatic purposes. The Fed was empowered to enact programmatic adaptations "to carry out the provisions" of the Act, and it was separately authorized to enact programmatic innovations in "any aspect of the payment system."¹²² Taken literally, the first authorization is subsumed within the second. But they are stated separately because Congress was envisioning two different types of programs and wanted to authorize both.

Programmatic action is obviously quite discretionary, and uniformity can only be achieved if the program emanates from a single source. Once Congress had decided that it wanted this sort of programmatic action, for both the adaptation and innovation, reliance on a federal agency was inevitable. Congress had no conscious antipathy toward the UCC, nor any abstract policy of federalization. Indeed, most of the members, had they been asked, would probably have expressed respect for state law and for the principles of federalism. The federalization that the Expedited Funds Availability Act accomplishes was the result of Congress' substantive purposes, not its desire for federal domination. Congress wanted operational rules that dealt with the mechanics of the check collection system; flexible, ongoing administrative enforcement to ensure these rules were followed; and program development to adapt its own rules to changing circumstances and to articulate new sets of rules in areas where it had not legislated. These motivations, when combined with the generally perceived need for uniformity, led to the federalization of the check collection system.

IV. NORMS

Since law is normative as well as instrumental, the federalization process must be understood as an effort to express values, as well as an effort to implement a social policy. Here, too, the process is more complex than it initially appears. One might assume that federalization occurs when a value is shared by everyone. But in that case, there is no reason why that value should not motivate legal enactments in the states and thus become universal through its individual enactments. The UCC

119. 12 U.S.C.A. § 4002(d)(1) (West Supp. 1988).

120. *Id.* § 4003(a)(1).

121. *Id.* § 4003(b)(2), (b)(8), (f).

122. *Id.* § 4003(c)(1)(A).

exemplifies precisely such a process. Articles 3 and 4 are notoriously pro-bank,¹²³ but banks were the only organizations concerned with check collection law during the period when state legislatures were considering the UCC. The legislators themselves seem to have had no particular views about the field and probably regarded the UCC as neutral, good-government reform legislation. With such attitudes dominant throughout the nation, satisfactory rules could be readily achieved by separate enactment in each state legislature.

But if federalization is not driven by universal norms, it is clearly not driven by separate ones. States with different views should be quite content to go their own way and would presumably prefer to do so, provided that uniformity is not a pressing concern. For example, our states display substantial variation in their revenue-raising functions, but there has been no demand for a federally-designed scheme of state taxation. What seems to motivate federalization, from the normative perspective, are differences in values between states, when one of those values incorporates a claim to universality. In other words, federalization is generally driven by the desire to impose a non-universal norm on the nation as a whole. In that case, the proponents of the norm will see federal control as a method for achieving their desires.

The controversy over par collection exemplifies the link between federalization and norm-imposition. Generally speaking, money center banks collected checks at par, at least when the check was deposited at another bank in the same city. The practice of charging exchange, on the other hand, was prevalent in rural regions and in the South,¹²⁴ which was predominantly rural at this time. Creating a national check collection system through the Federal Reserve Act was thus a means of imposing the urban, industrial norm upon the hinterlands. From its inception, the Fed was heavily committed to this policy; having been denied comprehensive legal power by Congress, in which the hinterlands were heavily represented, it resorted to the gunboat diplomacy of over-the-counter presentation. Resistance centered in the South, where the countervailing norms were strongest. When the Fed's effort to achieve universal par collection reached its peak in 1921, only 1,755 of the nation's 30,523 banks still charged exchange, and all of these were located in Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.¹²⁵ It was these very states, with the exception of South Carolina, and the addition of North Carolina and South Dakota, that fought back by passing laws that required banks to charge exchange fees.¹²⁶ Thus, the par collection controversy, like the civil rights movement or the Civil War, was an effort to impose Northern standards on the South.

The Expedited Funds Availability Act is the product of similar motivations. It was conceived and championed by the consumer movement, which regarded bank hold policies as an abuse. The consumer movement is national, but its strength differs from one part of the country to another. In particular, it tends to be strongest in the

123. See *supra* note 34 (citing sources).

124. W. SPAHR, *supra* note 17, at 101. The clearinghouses that developed in large cities during the nineteenth century were partially responsible for this practice. See *id.* at 99-101.

125. *Id.* at 246.

126. *Id.* at 251-54.

urban, industrial states and weaker in predominantly rural ones. As a result, California, Connecticut, Delaware, Florida, Maryland, Massachusetts, and New York were the states that enacted funds availability legislation.¹²⁷ These statutes were significant, but the consumer representatives saw the issue in universal terms and wanted legislation that would protect all consumers. From the time discussion of funds availability began, these consumer representatives were active in Congress, and they clearly regarded a federal statute that would impose a single set of rules throughout the nation as the goal of their efforts.¹²⁸

Conceivably, the consumer movement could have focused its effort on obtaining a uniform state law. The Uniform Commercial Code contains a funds availability provision;¹²⁹ while it is completely ineffectual, it does place the subject within the ambit of the Code, unlike other consumer issues such as the price of checking services. Moreover, those sections of the Code that deal with the check collection system were under continuous reconsideration by the Code's sponsors during the entire period of the funds availability debate.¹³⁰ But the uniform state law process, which was structurally disabled from meeting the demand for a regulatory regime, failed to reflect the full range of nationwide norms. The Code's sponsors never made a serious effort to establish truly representative drafting committees.¹³¹ Instead, they retained the structure and selection process that had evolved half a century ago, a structure which had drawn criticism from academics when the Code was first promulgated in 1951.¹³²

Of course, the Code readily survived the academic criticism and was enacted by every state between 1954 and 1968. But in the years that followed, the normative landscape was dramatically altered by the emergence of the consumer movement. The failure of the Code's sponsors to include consumer representatives, and the consumer movement's apparent lack of interest in being included, represent the marginalization of the uniform state law effort. In all likelihood, this results from the fact that the contemporary national debate, in commercial law as well as other areas, is a debate about the proper role of the regulatory state. A process that is outside the regulatory apparatus, for structural reasons, will also tend to be insulated from the full range of normative debate. There is, of course, a certain element of clubbiness about

127. See Cooper, *supra* note 41.

128. See, e.g., *Fair Deposit Availability Act: Hearings on S. 573 Before the Subcomm. on Senate Consumer Affairs of the Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 119 (1983) (statement of Ellen Broadman, Consumers Union).

129. U.C.C. § 4-213(4) (1978). See Cooter & Rubin, *supra* note 4, at 1130-35; Jordan, *supra* note 40, at 531-35.

130. The original effort was entitled The New Payments Code. See Brandel & Geary, *Electronic Fund Transfers and the New Payments Code*, 37 BUS. LAW. 1065 (1982); Leary & Pitcairn, *The Uniform New Payments Code: The Essential Identity of "Pay" Orders and "Draw" Orders*, 12 HOFSTRA L. REV. 913 (1984); Miller, *A Report on the New Payments Code*, 39 BUS. LAW. 1215 (1984). After the demise of this project, the revision effort was reconstituted on a more modest scale. See Rubin, *supra* note 76.

131. The 3-4-8 Committee, which sponsored the New Payments Code, did not contain any consumer representatives. More significantly, neither the ALI nor NCCUSL had any mechanism for including consumer organizations.

132. See Beutel, *supra* note 34; Gilmore, *supra* note 34, at 374, 377 ("As Beutel says . . . Article 4 . . . was proposed by a group of bank counsel. . . . [N]o member of the drafting staff for the Code participated in their work and . . . the resulting draft was presented to the joint meeting with almost no opportunity for preliminary study by anyone outside the banking group.").

the ALI and NCCUSL, but it is the marginality of their enterprise that has enabled them to preserve this insulation.

Consequently, the consumer movement looked to Congress, not to the uniform state law process, as a means of imposing its norms on the nation as a whole. As has often been the case in recent years, its efforts were successful, largely because of its ability to mobilize a nationwide constituency. What surprised consumer advocates, as well as most observers, was the breadth of the authority the Fed was granted and the extent to which federalization was authorized in the resulting statute. The statute's proponents were only concerned with consumer protection—that is, norm imposition. But once Congress directed its attention to the area, the desirability of a regulatory regime became apparent and other federalizing aspects of the statute followed naturally from that regime.

CONCLUSION

The federalization of the check collection law cannot be ascribed to a loss of faith in federalism or to some moral lapse on the part of freedom loving citizens. Rather, it is the product of positive forces: the demand for a uniform regulatory approach that exercises operational, supervisory control over the check collection system and the emergence of a politically powerful movement with nationwide norms and access to a national decisionmaker. The demand for regulation generated the Expedited Funds Availability Act, and with its passage, the era of state law control over the payment system is coming to an end.

In future years, we are likely to see further federalization of check collection law. The rules for check return have already been federalized by Reg CC, as have those aspects of the bank-customer relationship dealing with funds availability. The Act also gives the Fed some specific directives for regulating the forward collection process, and the Fed will almost certainly respond with regulations that federalize the rules for this process. In addition, there will be continuing demands for regulation and consumer protection in the remaining areas of bank-customer relations, including the pricing of specialized functions like stop payment, and the allocation of fraud, forgery, and error losses. The Fed does not have any immediate plan to impose federal standards on these areas, but given the forces at work, we are likely to see the development of these standards well before the advent of the next millennium.